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CHARLES ELMORE CROPLEY
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IN THE

SUPREME COURT

OF THE

UNITED STATES.

October Term, 1937
No. 536.

SANTA CRUZ FRUIT PACKING CO.

vs.

NATIONAL LABOR RELATIONS BOARD,

BRIEF OF H. W. O'MELVENY AND WALTER K. TULLER (LOUIS W. MYERS, OF COUNSEL) IN SUPPORT OF THE PROPOSITION THAT THE NATIONAL LABOR RELATIONS BOARD HAS NO JURISDICTION OVER THE RELATIONS BETWEEN PETITIONER AND ITS EMPLOYEES.

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As Amici Curiae.

LOUIS W. MYERS,
Of Counsel.

Parker & Baird Company, Law Printers, Los Angeles.

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This case presents the question whether the Federal Government or the State has jurisdiction over the labor relations of an employer who manufactures a product within the State out of materials produced within the State, with the expectation that a considerable portion of the manufactured product will thereafter be shipped in interstate commerce. Clearly both governments cannot have jurisdiction. The question transcends in importance any private controversy. Its correct determination involves, as we conceive it, nothing less than the preservation of our federal system as established by the Constitution.

A determination that the Federal Government has jurisdiction would result in extending the power of the Federal Government over almost all human activities and, conversely, in so emasculating the powers of the States as practically in effect to destroy their powers and, likewise, to destroy the federal system.

The powers of the Federal Government, being only those that are delegated to it by the Constitution, and all others being reserved to the State (both by the very nature of the Constitution and by the express provisions of the Tenth Amendment), it is clear that if the Federal Government has any power over this matter it must arise from the provisions of article I, section 8, subdivision (3) of the Constitution, which provides that the Congress shall have power

> "to regulate commerce with foreign nations, and among the several States, and with the Indian tribes."

We suppose no one will contend that manufacture is commerce among several States, or indeed commerce at all. It would seem that the claim that the Federal Government has jurisdiction and power would have to rest on some such argument as this: That if the business of petitioner should cease or be substantially disturbed, less goods will thereafter move in interstate commerce, and that this so *affects* interstate commerce that it is sufficient to give the Federal Government jurisdiction over the manufacturer and his relations with his employees. This argument proves too much—so much, indeed, that if adopted it would (as this Court has frequently pointed out) for all practical purposes destroy the federal system established by the Constitution. There is hardly a human activity that does not

"affect" interstate commerce in the same way. Examples readily occur to the mind. A very large percentage of the cotton, corn, wheat, cattle and livestock, vegetables—indeed almost every agricultural product—is raised with the expectation that all or a large part of the crop will be, and it is in fact, shipped in interstate commerce or foreign commerce. If the operations of the farmer are interrupted or stopped, less goods will move in interstate commerce. Can it be contended that this fact takes away and destroys the right of the State to regulate, and confers upon the Federal Government the right to regulate, the relations between the farmer and his employee who plows the ground, who sows the seed, or his employee who cultivates or irrigates the growing crops, or his employee who harvests his crop after it is matured? It would seem clearly not. Yet, we submit, the principle involved is identical. Much of the coal, copper, iron, zinc, silver and indeed nearly all other metals that are mined in this country are mined with the expectation that they will, and they in fact do, thereafter move in interstate commerce. If the operations of mining are interrupted or cut off altogether, less of such products will thereafter move in interstate commerce. To this extent it may be said that, as a philosophical matter, the mining "affects" interstate commerce. But can it be held that this takes away from the States and gives to the Federal Government the power to regulate the labor relations between the mine operator and his employees? The principle is identical. Most of the timber that is cut in our forests is cut with the expectation that it will and it does, in fact, thereafter move in interstate commerce. Can it be held that this is sufficient to deprive the States of and give to the Federal Government the power to

regulate the relations between the timber owner and his employees who cut the trees or saw them in his sawmill? The principle is identical. We might extend these illustrations at great length. The fact is that the overwhelming majority of everything that is produced in the country, whether on the farms, in the mines, in the shops and factories of every kind, is produced with the expectation that all or a substantial portion will, and in fact it does, thereafter move in interstate commerce. To hold that the Federal Government has jurisdiction to regulate labor relations or other matters concerned in the *production* would be to destroy almost completely the powers of the States, and to make the Federal Government one of well-nigh unlimited power.

If the fact that the interruption or cessation of a particular activity will lessen the volume of goods which will thereafter flow in interstate commerce is sufficient to deprive the States of the power to regulate that activity and confer it upon the Federal Government, then it would seem that it would apply equally to the converse situation of that which we have been discussing, that is, to activities which use, consume or deal in goods that *have moved* in interstate commerce. If those activities cease, then less goods will thereafter move in interstate commerce. Thus grocery stores deal in tea, coffee, spices, sugar, rice, flour, cocoa, chocolate, and scores or hundreds of articles which are not produced or manufactured in the State, but are shipped in from foreign countries or from other States. If the operations of the store are interrupted or stopped, the result will be that a lesser volume of these articles will thereafter move in interstate commerce. But will it be contended that this takes away from the States and confers upon the Federal Government the power to regu-

late the operations of the grocery stores of the nation and the relations between the grocer and his employees? The principle, we submit, is identical. The same situation prevails in almost every form of merchandising. The list of illustrations to which the same rule would apply might be extended almost indefinitely. It would cover not merely every form of business, but even the professional man. The lawyer buys books and stationery and furniture and many other items that are manufactured in other states and are shipped in interstate commerce. If his operations cease it will result in less volume of goods moving in interstate commerce. The lawyer also renders indispensable services to the merchant, farmer and manufacturer. By ceasing to render these services, the activities of those persons might be interrupted and the future volume of interstate commerce diminished. The doctor and the dentist buy books and surgical and dental instruments and many other things which, likewise, have moved in interstate commerce. Does this fact give to the Federal Government the power to regulate them and their relations with their employees? Indeed, every individual does, and of necessity must, buy clothing and food and many other articles which have moved in interstate commerce—and if he ceases to buy them the volume of goods thereafter moving in interstate commerce will be lessened. Does this give to the Federal Government the power to regulate the individual so that he will continue to buy such goods, to the end that the volume of interstate commerce shall not thereafter be lessened?

It would seem that to ask these various questions is to answer them. If the constitutional system of dual sovereignty of State and Nation, each supreme within its own sphere, is to be maintained, then it must continue

to be held, as this Court has consistently held from the relatively early days of the Republic, that the Federal Government does *not* have power to regulate these matters, but that such power is lodged exclusively in the several States.

This Court has declared time and time again that to hold that the Federal Government has jurisdiction to regulate a particular activity because the interruption or cessation of that activity would result in lessening the volume of goods thereafter moving in interstate commerce, would be to destroy the federal system and would be violative both of the spirit and the letter of the Constitution. It has held time and time again for well-nigh a century that the fact that goods are produced with the expectation or intention that they will thereafter move in interstate commerce, and do so move in interstate commerce, does *not* deprive the States of jurisdiction to regulate all the various matters connected with production and does *not* confer jurisdiction upon the Federal Government. This principle has become, both by the terms of the Constitution itself and by this long line of decisions, a part of the very framework of our constitutional system. To overturn it would be to overthrow that system—to create a well-nigh absolute national government, with the States mere subservient territorial subdivisions, exercising only such privileges as might be conferred by the grace of the Congress.

We have no desire to burden the Court with an extensive review of all its previous decisions, or even with most of them, which have declared and enforced this principle. But some of the cases are so directly in point, and the reasoning is so compelling, that we trust it will not be amiss to invite attention to them.

In 1852, in the case of *Veazie v. Moor*, 55 U. S. 567, the court was considering the right of the State to grant the privilege of exclusive navigation to the upper part of the Penobscot River, which lies entirely within that State. The lower part of the river was closed by four dams erected for manufacturing purposes. The court held that the State had the power, and that a license from the United States to carry on "coasting trade" did not entitle a vessel to navigate the upper waters of the river. In considering the question whether the State or the Federal Government had jurisdiction of the subject-matter, this Court said:

> "* * * Commerce with foreign nations must signify commerce which in some sense is necessarily connected with these nations, transactions which either immediately, or at some stage of their progress, must be extra-territorial. The phrase can never be applied to transactions wholly internal, between citizens of the same community, or to a polity and laws whose ends and purposes and operations are restricted to the territory and soil and jurisdiction of such community. Nor can it be properly concluded that, because the products of domestic enterprise in agriculture or manufactures, or in the arts, may ultimately become the subjects of foreign commerce, that the control of the means or the encouragements by which enterprise is fostered and protected, is legitimately within the import of the phrase *foreign commerce, or fairly implied in any investiture of the power to regulate such commerce.* A pretension as far-reaching as this would extend to contracts between citizen and citizen of the same State, would control the pursuits of the planter, the grazier, the manufacturer, the mechanic, the immense operations of the collieries and mines and furnaces of the country; for there is not one of these avocations, the results of which may

> not become the subjects of foreign commerce, and be borne either by turnpikes, canals, or railroads, from point to point within the several States, towards an ultimate destination, like the one above mentioned. * * *"

(The italics in all quotations are supplied unless otherwise noted.)

In *Coe v. Errol* (1885), 116 U. S. 517, it was claimed that logs cut and intended for exportation to another State were protected by the interstate commerce clause of the Federal Constitution. The court overruled this contention. Among other things it said that when duties or imposts are laid on exports or imports from one State to another, "it cannot be doubted that such an imposition would be a regulation of commerce among the States and, therefore, void as an invasion of the exclusive right of Congress". (P. 526.) But the court held that the interstate commerce clause did not come into effect *until actual transportation commenced*. Among other things the court said:

> "* * * What we have already said, however, in relation to the products of a State intended for exportation to another State will indicate the view which seems to us the sound one on that subject, namely, that such goods do not cease to be part of the general mass of property in the State, subject, as such, to its jurisdiction, and to taxation in the usual way, *until they have been shipped or entered with a common carrier for transportation* to another State, or have been started upon such transportation in a continuous route or journey. We think that this must be the true rule on the subject. It seems to us untenable to hold that a crop or a herd is exempt from taxation

merely because it is, by its owner, *intended* for exportation. If such were the rule in many States there would be nothing but the lands and real estate to bear the taxes. Some of the Western States produce very little except wheat and corn, most of which is intended for export; and so of cotton in the Southern States. Certainly, as long as these products are on the lands which produce them, they are part of the general property of the State. And so we think they continue to be until they have entered upon their final journey for leaving the State and going into another State. * * * The carrying of them in carts or other vehicles, or even floating them, to the depot where the journey is to commence is no part of that journey. That is all preliminary work, performed for the purpose of putting the property in a state of preparation and readiness for transportation." (Pp. 527-8.)

In *Kidd v. Pearson* (1888), 128 U. S. 1, the question presented was whether a state had power to prohibit the manufacture of intoxicating liquor within its borders when such liquor was intended to be, and would in fact be, shipped in interstate commerce. The claim was that since the manufactured product was intended to be shipped in interstate commerce, the effect of allowing the State to prohibit its manufacture would be to *lessen the volume* of interstate commerce; hence that this fact deprived the State of jurisdiction and conferred it upon the Federal Government. This Court overruled this contention as being without merit. The Court said:

"* * * If it be held that the term includes the regulation of all such manufactures as are intended to be the subject of commercial transactions in the

future, it is impossible to deny that it would also include *all productive industries that contemplate the same thing.* The result would be that Congress would be invested, to the *exclusion* of the States, with the power to regulate, not only *manufactures,* but also agriculture, horticulture, stock raising, domestic fisheries, mining—*in short, every branch of human industry.* For is there one of them but does not contemplate, more or less clearly, an interstate or foreign market? Does not the wheat grower of the Northwest, and the cotton planter of the South, plant, cultivate and harvest his crop with an eye on the prices at Liverpool, New York and Chicago? The power being vested in Congress, and denied to the States, it would follow as an inevitable result that the duty would devolve on Congress to regulate all of these delicate, multiform, and vital interests—*interests which in their nature are and must be, local in all the details of their successful management.*" (P. 21.)

United States v. Knight Co. (1895), 156 U. S. 1, involved the question whether the provisions of the Sherman Act could constitutionally apply to a manufacturer of sugar located within a State, whose operations were confined to that State, even though the manufactured product was shipped in interstate commerce. The Court held it could not. Among other things it said:

"Doubtless the power to control the manufacture of a given thing involves in a certain sense the control of its disposition, but this is a secondary and not the primary sense; and although the exercise of that power may result in bringing the operation of commerce into play, it does not control it, and affects it only incidentally and indirectly. Commerce succeeds to manufacture, and is not a part of it." (P. 12.)

Capital City Dairy Co. v. Ohio (1902), 183 U. S. 238, involved the validity of the State's regulation of the manufacture of oleomargarine. The manufacturing took place within the State, but the product was intended to be, and in fact was, shipped in interstate commerce. In overruling the claim that the State statute amounted to a regulation of interstate commerce the Court said:

> "The contention that the statutes in question are repugnant to the commerce clause of the Constitution is manifestly without merit. All the acts of the corporation which were complained of related to oleomargarine manufactured by it in the State of Ohio, in violation of the laws of that State, and therefore operated on the corporation within the State and affected the product manufactured by it before it had become a subject of interstate commerce." (P. 245.)

In *Diamond Glue Co. v. U. S. Glue Co.* (1903), 187 U. S. 611, the State statute imposed certain regulations and required certain fees for doing a business within the State. The complainant asserted that this was unconstitutional as being a burden on interstate commerce because it was engaged in manufacturing glue which was intended to be and would be moved and sold in interstate commerce. The court held that this did not deprive the State of power to regulate the manufacturing business.

Cornell v. Coyne (1904), 192 U. S. 418. In this case cheese was manufactured within the State expressly for export. The State where it was manufactured attempted to tax it. The owner contended that since it was intended for export, such regulation by the State would constitute

a burden on interstate and foreign commerce and was beyond its jurisdiction. The Court overruled this contention. It quoted (p. 429) with approval from the *Knight* case, *supra,* the following:

> "Commerce succeeds to manufacture, and is not a part of it. * * * The fact that an article is manufactured for export to another State does not of itself make it an article of interstate commerce, and the intent of the manufacturer does not determine the time when the article or product passes from the control of the State and belongs to commerce."

In *Delaware etc. R. R. v. Yurkonis* (1915), 238 U. S. 439, plaintiff was injured while mining coal. The coal was intended to be shipped in interstate commerce. Plaintiff contended that this gave the Federal Government jurisdiction and so brought him within the provisions of the Federal Employers' Liability Act. The Court unanimously held his contention without merit, saying, among other things:

> "The averments of the complaint as to the manner of the receiving of the injury by plaintiff showed conclusively that it did not occur in interstate commerce. The mere fact that the coal might be or was intended to be used in the conduct of interstate commerce after the same was mined and transported did not make the injury one received by the plaintiff while he was engaged in interstate commerce. The injury happening when plaintiff was preparing to mine the coal was not an injury happening in interstate commerce, and the defendant was not then carrying on interstate commerce, facts essential to recovery under the Employers' Liability Act." (Pp. 444-5.)

In *Hammer v. Dagenhart* (1917), 247 U. S. 251, Congress had passed a statute prohibiting transportation in interstate commerce of goods made in a factory where children had been employed more than a certain period of time. The contention was made that the act was unconstitutional as attempting to regulate manufacture, which was within the power of the state and not the federal government. The court held the statute unconstitutional. We shall not quote much from the extensive discussion, but do call attention to the following:

> "Over interstate transportation, or its incidents, the regulatory power of Congress is ample, but the production of articles, intended for interstate commerce, *is a matter of local regulation.*" (P. 272.)

Mr. Justice Holmes delivered a dissenting opinion concurred in by three other justices, but even this dissenting opinion strengthens the position we take in the case at bar. The dissenting justices expressly recognize that the principles for which we contend are both sound and settled law. They recognize that Congress had no power to regulate labor conditions involved in manufacture. Their dissent was based upon the contention that *after manufacture is completed* and the finished product *starts moving* in interstate commerce, the jurisdiction of the federal government then attaches. Thus on page 277 Mr. Justice Holmes says:

> "The objection urged against the power is that the States have exclusive control over their methods of production and that Congress cannot meddle with them, and taking the proposition in the sense of direct intermeddling *I agree to it and suppose that no one denies it.*"

American Mfg. Co. v. St. Louis (1919), 250 U. S. 459. A city ordinance required the payment of a license tax, computed upon the amount of the sales of goods so manufactured, as a condition to manufacture. The complainant manufactured goods intended to be shipped in interstate commerce. It claimed that this brought its manufacturing operations within the power of Congress and therefore that they were beyond the power of the state. The court unanimously overruled this contention, holding that the manufacturing operations were subject solely to state regulation, even though the manufactured product was intended to be shipped in interstate commerce.

Crescent Cotton Oil Co. v. Mississippi (1921), 257 U. S. 129. Mississippi had passed a law prohibiting any corporation from owning or operating a cotton gin where such corporation was interested in the manufacture of cottonseed oil or cottonseed meal. Plaintiff operated cotton gins in Mississippi and intended to and did ship out of the state to a cottonseed mill in another state all the cotton seed which it purchased in connection with its ginning operations. It contended that the statute of the state was unconstitutional as to it on the ground that it constituted a burden on or interference with interstate commerce. The court unanimously held the statute valid. The opinion was written by Mr. Justice Clark. Among other things it said (after stating that ginning is a short but important step in manufacturing):

> "But that manufacture is not commerce was held in Kidd v. Pearson, 128 U. S. 1 (and a number of other cases cited), and the fact, of itself, that an article when in the process of manufacture is intended for export to another state does not render it an article of interstate commerce (citing decisions)

> * * * and, under the cases cited, it is only in this last case, and after the seed has been committed to a carrier for interstate transport, that it passes from the regulatory power of the state into interstate commerce and under the national power." (P. 136.)

Heisler v. Thomas Colliery Co. (1922), 260 U. S. 245, involved the validity of a tax levied by the State of Pennsylvania on anthracite coal. All the coal of this kind is found in Pennsylvania, so that it had a monopoly on it. Most of the coal was shipped to and used in other states. The attorneys general of a number of other states to which the coal was shipped appeared and attacked the tax as being a burden upon interstate commerce. The court unanimously overruled the contention and held that the matter was properly within the jurisdiction of the state. We quote the following, beginning on page 259, where the court stated that the contention is this:

> "It is that the products of a state that have, or are destined to have, a market in other states, are subjects of interstate commerce, though they have not moved from the place of their production or preparation."

The court then disposed of this contention in language every word of which is particularly pertinent to the case at bar. We quote as follows:

> "The reach and consequences of the contention repel its acceptance. If the possibility, or, indeed, certainty, of exportation of a product or article from a state, determines it to be in interstate commerce before the commencement of its movement from the state, it would seem to follow that it is in such commerce from the instant of its growth or production; and in the case of coals, as they lie in the ground.

> The result would be curious. *It would nationalize all industries;* it would nationalize and withdraw from state jurisdiction and deliver to Federal commercial control the fruits of California and the South, the wheat of the West and its meats, the cotton of the South, the shoes of Massachusetts, and the woolen industries of other states, at the very inception of their production or growth; that is, the fruits unpicked, the cotton and wheat ungathered, hides and flesh of cattle yet 'on the hoof,' wool yet unshorn, and coal yet unmined, because they are, in varying percentages, destined for and surely to be exported to states other than those of their production." (P. 260.)

Oliver Iron Co. v. Lord, 262 U. S. 173, was a very similar case applying to iron ore. Practically all of the iron was intended for, and was in fact shipped in, interstate commerce. The court held unanimously that it was subject to local regulation and not to federal regulation.

In *United Leather Workers v. Herkert* (1924), 265 U. S. 457, the lower court had granted an injunction against certain striking employees and labor unions, on the ground that their action violated the Sherman Act. The goods manufactured by the employer were to a large extent shipped in interstate commerce. This Court reversed the decree of the lower court, holding that the matter was local and not federal. We quote briefly from the opinion as follows:

> "The sole question here is whether a strike against manufacturers by their employees, intended by the strikers to prevent, through illegal picketing and intimidation, continued manufacture, and having such effect, was a conspiracy to restrain interstate com-

merce under the Anti-Trust Act because such products when made were, to the knowledge of the strikers, to be shipped in interstate commerce to fill orders given and accepted by would-be purchasers in other states, in the absence of evidence that the strikers interfered or attempted to interfere with the free transport and delivery of the products when manufactured from the factories to their destination in other States, or with their sale in those States.

"We think that this question has already been answered in the negative by this Court." (P. 464.)

The court then reviewed a number of authorities, many of which we have cited, and concluded:

"We concur with the dissenting judge in the Circuit Court of Appeals, when, in speaking of the conclusion of the majority, he said: 'The natural, logical and inevitable result will be that every strike in any industry or even in any single factory will be within the Sherman Act and subject to federal jurisdiction provided any appreciable amount of its product enters into interstate commerce.'" (P. 471.)

Industrial Assn. v. United States (1925), 268 U. S. 64. This again involved the subject of labor relations between employer and employee. A number of building contractors and dealers in building materials in San Francisco combined to established an open shop. The lower court held that this violated the Anti-Trust Act. This Court unanimously reversed. It held that the matter was purely local. This was held true in spite of the fact that one of the materials affected by the agreement was plaster and that the plaster used was to a large extent produced in other states and shipped into California. Stoppage of the use of such plaster would, of course, lessen the volume of

it which would thereafter move in interstate commerce. The court held that this was immaterial. The plaster had come to rest in California before it became subject to the agreement. The court said:

> "But here, the delivery of the plaster to the local representative or dealer was the closing incident of the interstate movement and *ended* the authority of the federal government under the commerce clause of the Constitution. What next was done with it, was the result of new and independent arrangements." (P. 79.)

The decision is too long to quote. We may, however, invite attention to the following appearing at the bottom of page 82:

> "The alleged conspiracy and the acts here complained of, spent their intended and direct force upon a local situation,—for building is as essentially local as mining, manufacturing or growing crops,—and if, by a resulting diminution of the commercial demand, interstate trade was curtailed either generally or in specific instances, that was a fortuitous consequence so remote and indirect as plainly to cause it to fall outside the reach of the Sherman Act."

Utah Power & Light Co. v. Pfost (1932), 286 U. S. 165, involved a situation much stronger for the claim of Federal jurisdiction than the case at bar. The complainant was engaged in generating electricity and transmitting it over wires to consumers in another state. The state where the generating plant was located levied a license tax on the manufacture or generation of this electrical energy. Its validity was attacked on the ground that it burdened interstate commerce. This court unanimously

overruled the contention. We quote briefly from the opinion as follows:

> "* * * On the contrary, the generator and the transmission lines perform different functions, *with a result comparable,* so far as the question here under consideration is concerned, to the *manufacture* of physical articles of trade and their *subsequent shipment* and transportation in commerce. * * *
>
> "* * * We are satisfied, upon a consideration of the whole case, that the process of generation is as essentially local as though electrical energy were a physical thing; and to that situation we must apply, as controlling, *the general rule that commerce does not begin until manufacture is finished, and hence the commerce clause of the Constitution does not prevent the state from exercising exclusive control over the manufacture.* * * *
>
> "Without regard to the apparent continuity of the movement, appellant, in effect, is engaged in *two* activities, not in one only. *So far as it produces electrical energy in Idaho, its business is purely intrastate, subject to state taxation and control."* (Pp. 180-182.)

Here it will be noted that the court held that the two functions (namely, generation of electricity, and its distribution in other states) were separate functions, the former subject to local regulation, the latter to federal regulation. They were even more closely related than are the functions of manufacturing products and later distributing them.

Champlin Refining Co. v. Commission (1932), 286 U. S. 210. In this case the State of Oklahoma imposed restrictions upon the production of oil intended for ship-

ment in interstate commerce. Its validity was attacked on the ground that this imposed a burden on interstate commerce. This court unanimously overruled the contention and held that the production was local and subject to state regulation only, even though the product was intended for shipment in interstate commerce. We quote from page 235:

> "It is clear that the regulations prescribed and authorized by the Act and the proration established by the commission apply only to production and not to sales or transportation of crude oil or its products. Such production is essentially a mining operation and therefore *is not a part of interstate commerce even though the product obtained is intended to be and in fact is immediately shipped in such commerce.*"

Chassaniol v. Greenwood (1934), 291 U. S. 584. In this case a city in Mississippi laid a tax upon each person buying or selling cotton within the city. Complainant was engaged in buying cotton for shipment outside the state. This court held that this did not make it subject to federal regulation. We quote briefly from page 587 as follows:

> "Ginning cotton, transporting it to Greenwood, and warehousing, buying and compressing it there, are each, like the growing of it, steps in preparation for the sale and shipment in interstate or foreign commerce. But each step prior to the sale and shipment is a transaction local to Mississippi, a transaction in intrastate commerce. Hence those engaged in performing any such local function may be subjected to an occupation tax, just as the property used, or processed, by them may be subjected to a property tax."

In two recent and carefully considered cases this Court has reannounced and enforced the same principle. The cases referred to are *Schechter Poultry Co. v. United States,* 295 U. S. 495, and *Carter v. Carter Coal Co.,* 298 U. S. 238. They involved applications of the principle to two converse situations; one where the party was dealing in goods that *had* moved in interstate commerce but where the movement had ceased before he dealt with them; the other where coal was mined with the purpose and intent of *thereafter* shipping it in interstate commerce, but where the movement had not yet commenced. Both cases involved a state of facts where interruption or cessation of the business would lessen the volume of goods that would thereafter move in interstate commerce. In both cases it was extensively and elaborately argued this was sufficient to give the Federal Government jurisdiction. In both cases this Court held that this fact did not give the Federal Government jurisdiction or power to regulate the business or the *labor relations* between the employer and his employees. It is submitted the decisions in these two cases, as well as the decisions in the cases heretofore referred to, establish the rule that is controlling in the case now at bar.

Since these two decisions are so recent and since nearly all the present justices participated therein, we assume it is unnecessary to quote extensively from the elaborate and carefully considered opinions that were rendered. We may, however, recall that in the *Schechter* case, page 546, this Court again pointed out, as it has so often done in the past that

> "If the commerce clause were construed to reach all enterprises and transactions which could be said to have an indirect effect upon interstate commerce, the

> federal authority would embrace practically all the activities of the people and the authority of the State over its domestic concerns would exist only by sufferance of the federal government."

And on page 548 (after citing with approval a number of decisions, including several we have heretofore reviewed) it said:

> "While these decisions related to the application of the federal statute, and not to its constitutional validity, the distinction between direct and indirect effects of intrastate transactions upon interstate commerce must be recognized as a fundamental one, essential to the maintenance of our constitutional system. Otherwise, as we have said, there would be virtually no limit to the federal power and for all practical purposes we should have a completely centralized government."

In the concurring opinion of Mr. Justice Cardozo, joined in by Mr. Justice Stone, it is said, at page 554:

> "There is no penumbra of uncertainty obscuring judgment here. To find immediacy or directness here is to find it almost everywhere. If centripetal forces are to be isolated to the exclusion of the forces that oppose and counteract them, there will be an end to our federal system."

It is submitted that the same principle is controlling in the case at bar. The two cases are simply the converse of each other—the opposite sides of the same shield. In both there is involved a local business. One deals with a commodity or product before it enters interstate commerce; the other after it has ceased its movement in interstate commerce. In both the claim of federal right to

regulate was based upon essentially the same contention on which it must be based in the case at bar.

The opinions in the *Carter Coal* case are so elaborate that we shall not make any extensive quotations. We may, however, invite attention to the fact that the Court again declared and applied the principle so often declared in the past

> "That commodities produced or manufactured within a state are intended to be sold or transported outside the state does not render their production or manufacture subject to federal regulation under the commerce clause." (P. 301.)

It pointed out that in principle there is no difference between the *Schechter* case and the *Carter* case. (See page 309.) The case now at bar seems clearly to fall within the same principle. In the concurrent opinion of the Chief Justice it was pointed out that to apply the rule contended for by the government would enable Congress to

> "assume control of virtually all the activities of the people to the subversion of the fundamental principle of the Constitution",

and that for the Court to adopt the government's claim to jurisdiction would be

> "for the Court to amend the Constitution by judicial decision". (Pp. 317-18.)

As we read the opinion of the learned dissenting Justices, all of whom had concurred in the decision of the *Schechter* case, their dissent was based on an entirely different ground and one that did not involve the question of the power of Congress to regulate the labor relations

between the mine owner and his employees engaged in mining operations.

Thus it is seen that this Court has held time and time again for nearly a century that the power now claimed by the National Labor Relations Board to regulate the labor relations in the manufacturing business involved in the case at bar is a power that is vested in the several States and is not within the scope, jurisdiction or power of the Federal Government. The learned Court below (the Circuit Court of Appeals of the Ninth Circuit) held, however, that the *Carter Coal* case had been, in effect, overruled by the several decisions of this Court in connection with the National Labor Relations Act—the so-called Wagner Act—to which reference will be made a little later. Strangely enough, the Court below does not seem to have considered the *Schechter* case and the long line of decisions, to some of which reference has been made, declaring and enforcing the same principle. It is not for counsel to suggest to this Court what it meant by its decision in the Wagner Act cases. We have argued before other courts that it is incredible that this Court should have intended to overrule this long established and fundamental constitutional principle and the long line of cases declaring and enforcing it, without considering them at length, and without announcing that the principle is a false one, and that the cases declaring it and enforcing it are overruled.

The decision of the Court below is that "if any substantial percentage of a product produced in a state is produced to enter interstate or foreign commerce," the Federal Government and not the State has power to

regulate the production and the labor relations between the employer and the employees engaged in production. Circuit Judge Haney carried this theory to its logical conclusion and said that if even one per cent of the product moves in interstate commerce, the power to regulate is in the Federal Government. This entire theory is diametrically contrary to the long line of decisions by this Court, to some of which attention has already been invited. If it is the law, then those decisions are not the law. We submit that the view of the Court below is wrong and that it attempts to introduce into the equation an entirely false element. The controlling fact is what is the *nature* of the activity in question—not what will later be done with the products arising as a result of that activity. If the nature of the activity is local, then it is clear that if our Federal system is to be preserved, the control of that activity must rest with the State, not with the Federal Government. The nature of the activity of *production* is not affected by what is done with the product *after* production is complete. This is equally true whatever percentage—whether 39 per cent as in the case at bar, whether 50 per cent or 100 per cent—of the product may thereafter move in interstate commerce. We call attention to the fact that in practically every one of the cases heretofore reviewed, either all or the great majority of the product was intended to move in interstate commerce and did, in fact, so move. Yet it was held that the Federal Government had no jurisdiction to regulate the activity; that this did not deprive the States of their jurisdiction and confer it upon the Federal Government. To hold as the Court below did, is to overrule all these decisions.

Any other rule than that established by the numerous decisions of this Court, it is submitted, would be not only unsound in principle but unworkable in practice. In the first place it would make either (a) the *intent* of the manufacturer or other producer of a commodity, or (b) the fact of what is done with the product *after production is complete*, control the jurisdiction to regulate production, as between the State on the one hand and the Federal Government on the other. Either is simply impossible.

If the intent of the Producer is controlling, *when* is that intent to be determined? The Producer may start production with the intention of selling it within the State; may later change his mind and decide to sell it out of the State; and may later again change his mind and decide to sell it within the State. Which government is to have jurisdiction to regulate the matters connected with production? Or is the jurisdiction to shift back and forth like a shuttle-cock between the State and the Federal Government each time the Producer changes his mind? Meantime, how is the intent of the Producer to be established? By the time it is established it may well be either that the Producer had changed his mind or that production is complete and the question moot. Moreover, can it be that where two persons are engaged in exactly the same activity side by side—for example, two packing plants, both buying their raw material within the State—one is subject to State regulation and the other to Federal regulation, because one expects to

sell his finished product inside the State and the other expects to sell his outside the State?

Still further, which government has jurisdiction in the case (which is a very common case), where the Producer at the time of production has *no intent either way?* Probably a large part of the goods produced in this country are produced under just this condition. The Producer brings them into being with the idea of selling them in whatever market he can sell them to the best advantage. Which government is to have jurisdiction over the production? We might elaborate instances at length. Enough have been given, we trust, to show that any attempt to fix jurisdiction as between the State and the Federal Government by the intent of the Producer is not only contrary to sound principle and the controlling decisions, but would be utterly unworkable, and indeed impossible, in practice.

Now suppose it is suggested that the conflicting claims of jurisdiction between the State and the Federal Government to regulate production shall be determined by what is done with the product after production—that is, by the fact as to whether it does or does not move in interstate commerce. This would be to make jurisdiction over the activity of production depend *upon a fact occurring after production is finished.* Under this rule if the product was sold in intrastate commerce the State would have jurisdiction. If the product moved in interstate commerce the Federal Government would have jurisdiction. But which government would have jurisdiction

while the production was taking place? That is the time when jurisdiction must be exercised if it is to be exercised at all. Is it not obvious that such a rule would be both unsound in principle and impossible in practice?

It is again submitted that the only sound rule, the only constitutional rule and the only practical rule is that to which this Court has consistently adhered and has so often declared and enforced, as shown in the cases heretofore reviewed.

The decision of the learned Court below confuses two separate and distinct activities, namely, production and distribution. They are, *in fact,* separate activities. They have been held to be separate in law as well by all the decisions of this Court heretofore cited. When the farmer grows a crop, or the miner mines minerals, or the lumberman cuts timber, or the manufacturer manufactures a product, he is engaged in production, not distribution. If, after the crop is grown, the farmer loads it into a truck and moves it across the state line to sell it, he is not then engaged in production but in the *separate* activity of distribution. The fact that the State has jurisdiction over his local activities in producing the crop does not give the State jurisdiction over his subsequent and separate activity of distribution in interstate commerce. No more, it is submitted, does the fact that the Federal Government has jurisdiction of his activity of distribution give it jurisdiction over the separate and precedent activity of production. The fact that when the farmer produced the crop he either did or did not expect that

after it was produced he would move it in interstate commerce, cannot change the nature of the activity of production. Nor can the fact that when he produced it he did *not* expect thereafter to move it in interstate commerce change the fact that if he *does* move the finished product in interstate commerce, that activity is subject to regulation by the Federal Government. Hence, we respectfully insist that both on controlling authority and as a matter of sound and necessary principle the element which the learned Court below considered determinative (namely, what percentage of the finished product is intended to move or does in fact move thereafter in interstate commerce) is a false element in the equation.

It should not be forgotten that the power delegated to the Federal Government is simply the power to regulate "commerce among the several States." We submit that by no process short of nullifying the whole purpose and intent of the Constitution and ignoring as well its express provisions, can the conclusion be reached that this constitutes a delegation of power to regulate activities which are *not* commerce among the several States, and which indeed *are not commerce at all.* The production of goods is not commerce. This is as true of producing them by manufacturing processes as it is of producing them by raising crops. In its final analysis, the claim of power asserted by the Government is, we submit, nothing short of a claim to a power which is not granted to it by the Constitution, but is *denied* to it. We respectfully submit that to sustain this claim would be amendment of the Constitution, if not indeed nullification.

The Wagner Act Decisions.

The learned Court below held that the case at bar is controlled by the decisions in the so-called Wagner Act cases, particularly the *Jones & Laughlin* case, the *Friedman-Marks* case, and the *Fruehauf* case. It further held that they had the effect of overruling the *Carter Coal* case and (we assume, although the Court below did not mention them) the long line of other decisions announcing and enforcing the same principle. But this view seems to overlook or ignore the fundamental difference and distinction in the *facts* of those cases and the case at bar. In all those cases this Court was at pains to point out the fact that the movement in interstate commerce had commenced *long before* the activity production commenced. The activity of production was in fact *in the very midst of* interstate commerce. In the *Jones & Laughlin* case this Court pointed out all of the various activities in interstate commerce that preceded the commencement of the manufacturing operations. It included shipment of ore, coal, limestone; it included the use of railroad facilities, of lake and river facilities and much more to like effect. The activity of manufacture was likened to the *heart* of a self contained highly integrated body, drawing in raw materials from numerous states, transforming those materials and then pumping them out to all parts of the nation. Obviously we have no such situation in the case at bar.

In the *Friedman-Marks* case this Court pointed out that 99.57 per cent of the woolen and worsted goods which

were manufactured into clothes were brought in from outside states. In the *Fruehauf* case the facts were similar. Most of the lumber was transported from southern States; most of the finished parts were transported from States other than the State where the manufacturing plant was located; more than 50 per cent of other materials used were brought in from other States.

It seems clear that the holding in these cases did not and does not involve any holding that the State is to be denied the right to regulate manufacturing or other production within its borders where all or most of the materials which are used are procured within the State. It seems reasonable to assume that this was the view of this Court. It would be a violent assumption that this Court intended to overrule the long line of cases heretofore noted, and the principles that have become a part of the fabric of our constitutional system, without even mentioning them.

In considering a problem so realistic and so highly important as that of drawing the dividing line between the jurisdiction of the State and the jurisdiction of the Federal Government, it seems wise to bear in mind the warning so frequently given by this Court that we should not allow ourselves to be governed by the "tyranny of labels." We have in mind particularly the labels that have come to be known as "flow" of commerce and "stream" of commence. No doubt these have their place as aids to, but certainly not as controlling, fundamental constitutional

principles. The facts in the Wagner Act cases may have been or may not have been technically within the concept of "flow" or "stream" of commerce. We doubt if this is of major importance. They are, however, very analogous to cases in which this Court has held that where the power of Congress *has attached* by reason of the fact that interstate commerce has commenced, it is not lost by a temporary holding of the goods in a State. It is not necessary to argue that cases like *Swift v. United States,* 196 U. S. 375; *Stafford v. Wallace,* 258 U. S. 495; *Chicago Board of Trade v. Olsen,* 262 U. S. 1, are controlling. Perhaps they are rather illustrations of the same underlying principle which led this Court to hold in the Wagner Act cases that the power of Congress, which had attached by the large movement of goods in interstate commerce prior to the commencement of manufacture, was not lost. It would seem that no one can deny that there is a fundamental difference between the case where large movements in interstate commerce have commenced (and so the power of Congress has attached) on the one hand, and the case at bar, where no interstate commerce or movement has occurred, and hence, nothing has occurred to which the power of Congress can attach. The power of Congress to regulate interstate commerce, as this Court has frequently indicated, is a realistic power. It would seem that there must be some realistic occurrence before that power can attach. A mere idea or hope or expectation in the mind of a farmer or a miner or a manufacturer that, after his farming or his mining or his manufacturing

is completed, the resultant product may be or will be shipped in interstate commerce, seems clearly not to be such a realistic occurrence.

No one has ever suggested, so far as we know, that the *Swift* case, the *Stafford* case and the *Olsen* case overrule or are inconsistent with the principles and decisions of the *Carter Coal* case, the *Schechter* case, and the others heretofore reviewed. It is submitted that the Wagner Act decisions are no more inconsistent. In both series of cases this Court took what may be termed a realistic view of interstate commerce. In both the interstate commerce had commenced and, therefore, *the power of Congress had attached,* before the activity in question commenced. This Court, looking at the matter realistically, found that the power of Congress had not been lost. It is submitted that the same realistic viewpoint confirms the conclusion that where, as in the case at bar, interstate commerce has *not* commenced before the manufacturing or like activity, but the production and its precedent steps are essentially *intrastate, the power of the State has not been lost.* Until interstate commerce begins, there would seem to be nothing to which the power of Congress to regulate interstate commerce can attach. Any other view must necessarily result, as this Court has so frequently and so clearly pointed out, in giving the Federal Government almost universal power and in rendering the States almost powerless. It would result in amending the Constitution and in transforming the power of Congress, so carefully re-

stricted to regulating interstate commerce, into a general power to regulate practically every activity of life.

It is submitted that this basic difference in the facts between the several Wagner Act cases and the case at bar points the distinction in the legal principles which control. In the former cases interstate commerce on a substantial scale, and directly connected with the activity in question, had commenced long before that activity commenced. The power of Congress had attached. The particular activity in question was aptly likened to the heart pumping in the blood and pumping it out again, both in interstate commerce. The holding of the Court was, we submit, nothing more than a holding that the heart is part of the circulatory system (which, in the figure, represents interstate commerce), and that the sovereign which has jurisdiction over the circulatory system has jurisdiction over the heart. But the case at bar is obviously and basically different. The manufacturing activities here involved are no part of that circulatory system. They are separate and distinct from it. There is not any interstate commerce before production, or even while production is going on. This is as true of the activity involved here as it is of the activity of a farmer. We again respectfully urge that in the case at bar, as distinguished from the Wagner Act cases, there is nothing to which the power to regulate interstate commerce can attach until after production is complete. This is a fundamental difference in fact, and hence in the legal principle which controls, that the court below seems completely to have overlooked.

Those Who Framed and Those Who Adopted the Constitution Intended and Understood That This Power Was Reserved to the Several States.

That those who framed the Constitution and the people who adopted it understood and intended that the several States, and not the Federal Government, should have jurisdiction over such an activity as the one involved in the case at bar is so clear that we doubt if any one will question it. Indeed, if any one at that time had suggested that the Constitution deprived the States of this power and conferred it on the Federal Government, it is safe to say that the Constitution would never have been adopted. The whole history of the times proves that the people were utterly unwilling to grant to the Federal Government any such power of their daily lives and the activities by which they earned their livelihood. The people never would have consented to such emasculation of the power of the States and to such centralization in the Federal Government of well-nigh absolute power over their daily lives and activities as this would bring about. This fact was noted and considered by this Court in the *Carter Coal* case, 298 U. S. at pages 295-6. It concluded this branch of the discussion with the following sentence:

> "It is safe to say that if, when the Constitution was under consideration, it had been thought that any such danger lurked behind its plain words, it would never have been ratified."

A rather diligent search of the political literature of the time of the adoption of the Constitution, and of the early days of the Republic, fails to disclose any suggestion that the interstate commerce clause, or indeed any part of the Constitution, would permit to the Federal Govern-

ment any such power over the lives and activities of the people or any such restriction and emasculation of the powers of the States. Indeed, we think it can fairly be said that it shows the direct contrary. Any attempt to go at length into the numerous writings of the time would unduly extend this brief. A few representative quotations, however, may not be amiss.

In *The Federalist Papers,* No. XVII, written by Hamilton, who was the outstanding proponent of a strong Federal Government, it is said:

> "The administration of private justice between the citizens of the same state; *the supervision of agriculture,* and of other concerns of a similar nature; all those things, in short, *which are proper to be provided for by local legislation,* can never be the desirable cares of a general jurisdiction. It is therefore improbable, that there should exist a disposition in the federal councils, to *usurp* the powers with which they are connected * * *."

In the same papers, No. XLII, written by Madison, it is clearly indicated that in his view the power which would be given to the Federal Government if the Constitution were adopted is limited to regulating actual transportation between the States, not to the production of articles intended for such transportation. Among other things, it is said:

> "The defect of power in the existing confederacy, to regulate the commerce between its several members, is in the number of those which have been clearly pointed out by experience. * * * A very material object of this power was the relief of the states which import and export through other states, from the improper contributions levied on them by

the latter. Were these at liberty to regulate the *trade between state and state*, it must be foreseen, that ways would be found out, to load the articles of import and export, during the passage through their jurisdiction, with duties which would fall on the makers of the latter, and the consumers of the former. * * *

"The necessity of a superintending authority over the *reciprocal trade* of confederated states, has been illustrated by other examples as well as our own."

In No. XLIV, written by Madison, it is said:

"But ambitious encroachments of the federal government, on the authority of the state governments, would not excite the opposition of a single state, or of a few states only. They would be signals of general alarm. * * * *But what degree of madness could ever drive the federal government to such an extremity?* * * *

"The only refuge left for those who prophesy the downfall of the state governments, is the visionary supposition, that the federal government may previously accumulate a military force for the projects of ambition."

If the intent of the Constitution was that the Federal Government should not have authority to regulate the activities of agriculture or manufacture, even though the products were intended to be thereafter shipped in interstate commerce, then it is submitted that is still the rule of the Constitution. The case is not at all the same as if some factual situation had developed that was not contemplated by the Constitution. The fact is that at the

very time the Constitution was adopted, shops and factories were making goods that were intended for interstate shipment and farmers were growing crops that were intended for interstate shipment. If the Constitution had declared in express terms that the States and not the Federal Government had the power to regulate such activities, no one could fairly contend that this Court should now rule the opposite. It is submitted that the framers intended and the Constitution does lay down this rule, either in express terms or by clear implication. That which is clearly implied is as much a part of the Constitution as that which is expressed in specific terms. *South Carolina v. United States,* 199 U. S. 437.

It may be argued that the public interest would be subserved by depriving the States of this power and conferring it on the Federal Government. But this is a matter of opinion and judgment. Some may, in good faith, strongly believe it; others, in equal good faith, just as strongly deny it, and insist that the welfare of the country can only be promoted by preserving the powers of the States and maintaining the Federal System. But after all, the question is a political, not a judicial one. If the courts were to consider such arguments *it would be the end of constitutional government.* The wisdom of every limitation in the Constitution might then be argued, and, if found unwise, set aside. If this or any other limitation in the Constitution is contrary to the public welfare, then the people have the power to change it. But until they do change it, it is, and, if we are to preserve the constitu-

tional government, it must be "The Supreme Law of the Land." Washington foresaw that situations of this very kind would arise. So far as we know, no one has ever attempted to challenge the profound truth of the following excerpt from his Farewell Address, which might have been written to meet the very case now before the Court:

> "If in the opinion of the people the distribution or modification of the constitutional powers be in any particular wrong, let it be corrected by an amendment in the way which the Constitution designates. But let there be *no change by usurpation;* for though this in one instance may be the instrument of good, it is the customary weapon by which free governments are destroyed."

And again in the same address:

> "The basis of our political systems is the right of the people to make and to alter their constitutions of government. But the constitution which at any time exists till changed by an explicit and authentic act of the whole people is sacredly obligatory upon all."

Thomas Jefferson wrote:

> "I consider the foundation of the Constitution as laid on this ground: That 'all powers not delegated to the United States, by the Constitution, nor prohibited by it to the States, are reserved to the States, or to the people.' To take a single step beyond the boundaries thus specifically drawn around the powers of Congress, is to take possession of a boundless field of power, no longer susceptible of any definition."

(Ford, Writings of Thomas Jefferson, Vol. V, p. 285.)

President Andrew Jackson, in his Farewell Address to the people at the conclusion of his second term, uttered words of counsel and warning that are equally pertinent and compelling today. Among other things he said:

> "It is well known that there have always been those amongst us who wish to enlarge the powers of the General Government, and experience would seem to indicate that there is a tendency on the part of this Government to overstep the boundaries marked out for it by the Constitution. Its legitimate authority is abundantly sufficient for all the purposes for which it was created, and its powers being expressly enumerated, there can be no justification for claiming anything beyond them. Every attempt to exercise power beyond these limits should be promptly and firmly opposed, for one evil example will lead to other measures still more mischievous; and if the principle of constructive powers or supposed advantages or temporary circumstances shall ever be permitted to justify the assumption of a power not given by the Constitution, the General Government will before long absorb all the powers of legislation, and you will have in effect but one consolidated government. * * *; and every friend of our free institutions should be always prepared to maintain unimpaired and in full vigor the rights and sovereignty of the States and to confine the action of the General Government strictly to the sphere of its appropriate duties."

The Rule Contended for by the Government Would Result in Constant Clashes of Jurisdiction.

If the principle laid down by the court below should be adopted, it would inevitably lead to multitudinous clashes between the Federal Government and the several States, resulting in great confusion and in serious injury to every line of productive activity. We do not suggest that this is any argument against holding that the Federal Government has jurisdiction, if that right is clear under the Constitution. But we do suggest that if the right is not clear, then it is worthy of consideration. The Constitution was intended to create a practical, working, efficient plan to promote the public welfare. If there is fair doubt as to its construction and application, it would seem entirely proper to consider the serious injurious effects upon the public welfare that would result from a particular construction.

It cannot be expected that the several States will readily surrender jurisdiction to regulate the manifold activities of production, whether manufacturing, agricultural or otherwise, that take place entirely within their respective borders. If both the Federal Government and the several States attempt to regulate the same activity, it is almost certain that clashes in jurisdiction will result, and that different regulations will be prescribed. Quite aside from the unfortunate effects of numerous clashes in jurisdic-

tion, it must inevitably seriously hamper the orderly processes of business and production. Simply for purposes of illustration, we invite attention to recent action by and in the State of Wisconsin. In the United States Law Week for November 23, 1937, at page 14, there is a report of a case decided by the Circuit Court of that State. *Wisconsin Labor Relations Board v. Rueping Leather Co.* The Court sustained the action of the State Labor Board, acting under a law of the State, in assuming jurisdiction to regulate the labor relations of a manufacturer of leather goods who shipped the bulk of his finished product in interstate commerce. We refer to this only as an illustration of what it seems must inevitably happen on a large scale and throughout the country, if the principles announced by the court below should be adopted. Certainly there must be some activities of production that are subject to regulation by the States. If the intent of the producer of goods or the percentage of the finished product that will later move in interstate commerce is to control the matter as to whether the State or the Federal Government has jurisdiction, then all lines of production are likely to find themselves caught between the upper and nether millstones of conflicting State and Federal regulations. How far this will handicap and impede legitimate business and interfere with the public welfare may be a matter of opinion. But it would seem certain that it is bound to do so to a substantial and serious extent.

Conclusion.

If the system of dual sovereignty established by the Constitution is to be maintained, then at some point *there must be a line drawn* between the power of the State and the power of the Federal Government to regulate local production, whether it be agricultural or industrial. This Court expressly so declared in the *Jones & Laughlin* case. Among other things it said, in referring to the power of Congress:

> "Undoubtedly the scope of this power must be considered in the light of our dual system of government and may not be extended so as to embrace effects upon interstate commerce so indirect and remote that to embrace them, in view of our complex society, would effectually obliterate the distinction between what is national and what is local and create a completely centralized government." (301 U. S. at page 37.)

If the line is not drawn so as to leave to the several States the power to regulate such productive activities as the one involved in the case at bar, then it is hard to see where it can be drawn at all. It is believed that there can be no answer to the truth so often declared and enforced by this Court, that to allow the Federal Government to exercise the power here asserted would be to destroy the Federal System and create by judicial decree a totally centralized government. This would be, in the language of the Chief Justice in the *Carter Coal* case "for the court to amend the Constitution by judicial decision". It would annul the basic plan and purpose of the Constitution, would emasculate the States, and would make practically every activity of life subject to control from Washington.

It is too plain for doubt, we submit, that this would do violence to the purpose and intent of those who framed and those who adopted the Constitution, to the spirit and letter of the Constitution itself, and to the often expressed views of the great statesmen of the past as to what is essential if we are to preserve America, and would overrule nearly a century of decisions of this Court. It is believed to be no exaggeration to state that upon the decision in this case may well turn the preservation of our constitutional system, and perchance of the nation. It is not merely unconstitutional for the Federal Government to attempt thus to regulate the daily lives and activities of the people of the nation. It is impossible. The territory is too vast; the number of people and activities are too great; the local conditions are too diverse; and the spirit of local independence in local affairs is too strong within the breasts of the people, for it to be physically possible for the Federal Government to do the task, or for the people to submit to such a usurpation of power. If it were permitted, it might well mean the end of our institutions and of our nation. As President Washington wisely says in his Farewell Address:

> "But let there be no change by usurpation; for though this in one instance may be the instrument of good, it is the customary weapon by which free governments are destroyed."

The claim to power now made is perhaps the most striking illustration ever presented of what President Jackson referred to in his Farewell Address as

> "a tendency on the part of this Government to overstep the boundaries marked out for it by the Constitution".

Should it be allowed to prevail, his prophetic words may well come true and we may wake to find that

> "the General Government will before long absorb all the powers of legislation, and you will have in effect but one consolidated government".

The Federal System which the Constitution sets up is one of delicate balance between the powers of the several States and the powers of the Federal Government. The system can only be preserved if the balance is preserved. If the power here claimed for the Federal Government should be allowed, the balance is utterly destroyed. Practically all of the weights will then be on one side of the scale.

Even aside from the provisions of our Constitution, we have seen, through the experience of other countries in recent years, how disastrous are the effects which flow from concentration of well-nigh complete power in a few hands, to demonstrate how destructive this is to the fundamentals of liberty. But above and beyond this, we have our written Constitution, which it is submitted clearly denies to the Federal Government, and reserves to the several States, the power here claimed. It would be impossible to declare this more clearly or to demonstrate it more conclusively than this Court has done on many occasions throughout the life of the Republic. This Court has once again the opportunity to preserve our constitutional system.

The judgment of the court below should be reversed.

Respectfully submitted,

H. W. O'MELVENY,
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As Amici Curiae.

LOUIS W. MYERS,
Of Counsel.

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SUPREME COURT OF THE UNITED STATES.

No. 536.—October Term, 1937.

Santa Cruz Fruit Packing Company, Petitioner, *vs.* National Labor Relations Board.	On Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit.

[March 28, 1938.]

Mr. Chief Justice Hughes delivered the opinion of the Court.

The National Labor Relations Board on April 2, 1936, after hearing, found that petitioner, Santa Cruz Fruit Packing Company, a California corporation, had been engaged in unfair labor practices affecting commerce within the meaning of Section 8, subdivisions (1) and (3) and Section 2, subdivisions (6) and (7) of the National Labor Relations Act, and ordered petitioner to desist from such practices, to reinstate with back pay certain employees who had been discharged, and to post appropriate notices. 1 N. L. R. B. 454. Upon petition of the Board, the Circuit Court of Appeals affirmed the order so far as it related to petitioner's employees at its Oakland plant. 91 F. (2d) 790. In view of the importance of the question with respect to the application of the National Labor Relations Act, this court granted certiorari. — U. S. —.

There is no dispute as to the pertinent facts. The findings of the Board, supported by evidence, show the following:

Petitioner is engaged at its plant at Oakland in canning, packing and shipping fruit and vegetables, the bulk of which are grown in that State. During the "peak" season, petitioner employes from 1200 to 1500 persons of whom about 30 are warehousemen. The total "pack" in the year 1935 amounted to about 1,699,270 cases. Of this amount about 37 per cent. were shipped in interstate or foreign commerce, 9.02 per cent. being sent to foreign countries and approximately 473,620 cases, or about 27.89 per cent. to various points in the United States outside California. The sales to pur-

chasers outside the State were under either f.o.b. or c.i.f. San Francisco Bay Point contracts.

The methods of transportation are by water, rail and truck. Export shipments go by water and this is also the chief sort of carriage to points within the United States outside California, about 20 per cent. being shipped by rail and an undetermined amount by truck directly to the point of destination. "There is a constant stream of loading and shipping of products" out of petitioner's plant throughout the entire year. From 3000 to 4000 cases are loaded daily in the various vehicles of conveyance. That loading is a substantial and regular part of the work of the warehousemen in petitioner's employ. When the shipments are by rail or overland trucks, these employees load directly into the equipment of the principal carriers. When shipments are by boat, the warehousemen load the cases into the trucks which carry the goods to the docks.

Weighers, Warehousemen and Cereal Workers Local 38-44, International Longshoremen's Association, is a labor organization affiliated with the American Federation of Labor. Its efforts to organize the Oakland plant were begun in July, 1935, and many of the permanent warehousemen made application for membership. When this came to the attention of petitioner early in August, the General Manager announced that he would not permit a union in the plant because of competitive conditions. On their return from a union meeting at which the men were to be initiated, members of the night shift were prevented from entering the plant and the next morning the members of the day crew were similarly excluded. A picket line then formed, on the morning of August 8th, was maintained until September 27th with such effectiveness that eventually the movement of trucks from warehouses to wharves ceased entirely. The Board found: "The teamsters refused to haul Santa Cruz merchandise; the warehousemen at the dock warehouses who ordinarily unload the canned goods from the cars prior to their reloading into the ships, since they were members of the same union as the Santa Cruz warehousemen, also declined to handle Santa Cruz cargo. As members of the sister union, I. L. A. 38-79, the stevedores who move the goods from dock to ship also refused to move Santa Cruz cargo both at the East Bay and San

Francisco docks during the entire period that the picket line was maintained. Other unions whose members refused to move 'hot' Santa Cruz cargo were those members of the Sailors who comprised the crews of steam schooners and whose duties include the handling of cargo''. Petitioner points out that the refusal of the other unions to handle petitioner's goods was a violation of an arbitration award made in October, 1934, following the San Francisco maritime strike of that year.

The Board found that interference with the activities of employees in forming or joining labor organizations results in strikes and industrial unrest which habitually have had the effect in the canning industry of impeding the movement of canned products in interstate and foreign commerce. Reference was made to official statistics of the United States Department of Labor in relation to the canning and preserving industries from which it appeared that of the fifteen strikes and lockouts in 1934, and the first six months of 1935, eight were the outcome of difficulties in regard to union recognition and discrimination for union activities, 7,484 workers being involved in those stoppages.

The Board concluded that the discharge of the employees named and the refusal to reinstate them constituted an unlawful discrimination under the National Labor Relations Act and that the acts of petitioner had led and tended to lead to labor disputes burdening and obstructing commerce.

Petitioner contends that the manufacturing and processing in which petitioner is engaged are local activities and that the Board was without jurisdiction over the labor dispute involved in this case.

First.—There is no question that petitioner was directly and largely engaged in interstate and foreign commerce. We have often decided that sales to purchasers in another State are not withdrawn from federal control because the goods are delivered f.o.b. at stated points within the State of origin for transportation. See *Savage* v. *Jones*, 225 U. S. 501, 520; *Texas & N. O. R. R. Co.* v. *Sabine Tram Co.*, 227 U. S. 111, 114, 122; *Pennsylvania R. R. Co.* v. *Clark Coal Mining Co.*, 238 U. S. 456, 465-468. A large part of the interstate commerce of the country is conducted upon that basis and the arrangements that are made between seller and purchaser with respect to the place of taking title to the commodity, or as to

the payment of freight, where the actual movement is interstate, does not affect either the power of Congress or the jurisdiction of the agencies which Congress has established. *Pennsylvania R. R. Co.* v. *Clark Coal Mining Co., supra.*

Second.—The power of Congress extends not only to the making of rules governing sales of petitioner's products in interstate commerce, as, for example, with respect to misbranding under the Federal Food and Drugs Act (21 U. S. C., Sections 1 to 26), or with respect to forbidden discriminations in prices under the Clayton Act (15 U. S. C. 13), but also to the protection of that interstate commerce from burdens, obstructions and interruptions, whatever may be their source. *Second Employers' Liability Cases,* 223 U. S. 1, 51. The close and intimate effect which brings the subject within the reach of federal power may be due to activities in relation to productive industry, although that industry when separately viewed is local. It is upon this well-established principle that the constitutional validity of the National Labor Relations Act has been sustained. *National Labor Relations Board* v. *Jones & Laughlin Steel Corporation,* 301 U. S. 1, 38.

Petitioner urges that the principle is inapplicable here as the fruits and vegetables which petitioner prepares for shipment are grown in California and petitioner's operations are confined to that State. It is not a case where the raw materials of production are brought into the State of manufacture and the manufactured product is handled by the manufacturer in other States. In view of the interstate commerce actually carried on by petitioner, the conclusion sought to be drawn from this distinction is without merit. The existence of a continuous flow of interstate commerce through the State may indeed readily show the intimate relation of particular transactions to that commerce. *Stafford* v. *Wallace,* 258 U. S. 495, 516; *Chicago Board of Trade* v. *Olsen,* 262 U. S. 1, 33. But, as we said in the *Jones & Laughlin* case, the instances in which the metaphor of a "stream of commerce" has been used are but particular, and not exclusive, illustrations of the protective power which Congress may exercise. "The congressional authority to protect interstate commerce from burdens and obstructions is not limited to transactions which can be deemed to be an essential part of a 'flow' of interstate or foreign commerce. Burdens and obstructions may be due to injurious actions springing from other sources". *Id.,* p. 36.

Such injurious action burdening and obstructing interstate trade in manufactured articles may spring from labor disputes irrespective of the origin of the materials used in the manufacturing process. And the place where the manufacturer makes his sales is not controlling if the sales in fact are in interstate commerce. A few illustrations, from our many decisions, will suffice. In *Loewe* v. *Lawlor* [1908], 208 U. S. 302, the conspiracy of the "United Hatters", to compel the plaintiffs to unionize their factory, was held to fall within the Federal Anti-Trust Act because it was aimed at the destruction of the interstate trade in the manufactured hats. In *United Mine Workers* v. *Coronado Co.* [1922], 259 U. S. 344, 407, 408, the Court said that "Coal mining is not interstate commerce and the power of Congress does not extend to its regulation as such", but that "if Congress deems certain recurring practices, though not really part of interstate commerce, likely to obstruct, restrain or burden it, it has the power to subject them to national supervision and restraint". And in the second *Coronado* case [1925], 268 U. S. 295, 310, the Court held that the evidence was adequate to show that the purpose was to stop the production of non-union coal and prevent its shipment to markets of other States, and that a combination to that end would constitute a direct violation of the Anti-Trust Act. Another illustration is found in *Bedford Cut Stone Company* v. *Journeymen Stone Cutters' Association* [1927], 274 U. S. 37, 48, where a conspiracy of stone cutters was held to have "the immediate purpose and necessary effect of restraining future sales and shipments in interstate commerce" of the building stone which was quarried at petitioners' plants.

With respect to the federal power to protect interstate commerce in the commodities produced, there is obviously no difference between coal mined, or stone quarried, and fruit and vegetables grown. The same principle must apply, and has been applied, to injurious restraints of interstate trade which are caused by the practices of manufacturers and processors. *Standard Oil Company* v. *United States*, 221 U. S. 1; *United States* v. *American Tobacco Company*, 221 U. S. 106. The case of *Carter* v. *Carter Coal Company*, 298 U. S. 238, did not establish a different principle or overrule the decisions which we have cited. See *National Labor Relations Board* v. *Jones & Laughlin Steel Corporation, supra*, p. 41. Nor are the cases in point which are cited by petitioner with re-

spect to the exercise of the power of the State to tax goods, which have not begun to move in interstate commerce or have come to rest within the State, or to adopt police measures as to local matters. In that class of cases the question is not with respect to the extent of the power of Congress to protect interstate commerce, but whether a particular exercise of state power in view of its nature and operation must be deemed to be in conflict with that paramount authority. *Bacon* v. *Illinois,* 227 U. S. 504, 516; *Stafford* v. *Wallace, supra,* p. 526; *Minnesota* v. *Blasius,* 290 U. S. 1, 8.

Third.—It is also clear that where federal control is sought to be exercised over activities which separately considered are intrastate, it must appear that there is a close and substantial relation to interstate commerce in order to justify the federal intervention for its protection. However difficult in application, this principle is essential to the maintenance of our constitutional system. The subject of federal power is still "commerce", and not all commerce but commerce with foreign nations and among the several States. The expansion of enterprise has vastly increased the interests of interstate commerce but the constitutional differentiation still obtains. *Schechter Corporation* v. *United States,* 295 U. S. 495, 546. "Activities local in their immediacy do not become interstate and national because of distant repercussions". *Id.,* p. 554.

To express this essential distinction, "direct" has been contrasted with "indirect", and what is "remote" or "distant" with what is "close and substantial". Whatever terminology is used, the criterion is necessarily one of degree and must be so defined. This does not satisfy those who seek for mathematical or rigid formulas. But such formulas are not provided by the great concepts of the Constitution such as "interstate commerce", "due process", "equal protection". In maintaining the balance of the constitutional grants and limitations, it is inevitable that we should define their applications in the gradual process of inclusion and exclusion.

There is thus no point in the instant case in a demand for the drawing of a mathematical line. And what is reasonably clear in a particular application is not to be overborne by the simple and familiar dialectic of suggesting doubtful and extreme cases. The critical words of the provision of the National Labor Relations Act in dealing with the described labor practices are "affecting commerce", as defined (Sec. 2(6)). It is plain that the provision

cannot be applied by a mere reference to percentages and the fact that petitioner's sales in interstate and foreign commerce amounted to 37 per cent, and not to more than 50 per cent, of its production cannot be deemed controlling. The question that must be faced under the Act upon particular facts is whether the unfair labor practices involved have such a close and substantial relation to the freedom of interstate commerce from injurious restraint that these practices may constitutionally be made the subject of federal cognizance through provisions looking to the peaceable adjustment of labor disputes.

The question of degree is constantly met in other relations. It is met whenever the Interstate Commerce Commission is required to find whether an intrastate rate or practice of an interstate carrier causes an undue and unreasonable discrimination against interstate or foreign commerce. 49 U. S. C., Sec. 13(4). *The Shreveport Case,* 234 U. S. 342, 351. It is met under the Federal Employers' Liability Act, where the question is whether the employee's occupation at the time of his injury is "in interstate transportation or work so closely related to such transportation as to be practically a part of it". *Chicago & Northwestern Rwy. Co.* v. *Bolle,* 284 U. S. 74, 78, 79; *New York, New Haven & Hartford R. R. Co.* v. *Bezue,* 284 U. S. 415, 420. It is met in the enforcement of the Clayton Act in determining whether the effect of the described provisions in contracts for the sale of commodities is "to substantially lessen competition". 15 U. S. C., 13, 14. *Standard Fashion Company* v. *Magrane-Houston Company,* 258 U. S. 346, 356, 357; *Federal Trade Commission* v. *Raladam Company,* 283 U. S. 643, 647, 648.

Such questions cannot be escaped by the adoption of any artificial rule.

Fourth.—The direct relation of the labor practices and the resulting labor dispute in the instant case to interstate commerce and the injurious effect upon that commerce are fully established. The warehousemen in question were employed by petitioner in loading its goods either into the cars of carriers or into the trucks which transported the goods to the docks for shipment abroad or to other States. The immediacy of the effect of the forbidden discrimination against these warehousemen is strikingly shown by the findings of the Board. When the men found themselves locked out because of their joining the union, they at once formed a picket

line and this was maintained with such effectiveness that eventually "the movement of trucks from warehouse to wharves ceased entirely". The teamsters refused to haul, the warehousemen at the dock warehouses declined to handle, and the stevedores between dock and ship refused to load, petitioner's goods. These became, in the parlance of the men, "hot" cargo. Petitioner says that this was an unlawful conspiracy of those sympathizing with its discharged warehousemen, but it was the discrimination against them which led directly to the interference with the movement from the plant and elicited the support so effectively given.

It would be difficult to find a case in which unfair labor practices had a more direct effect upon interstate and foreign commerce.

The relief afforded by the Board, in requiring petitioner to desist from the unfair labor practices condemned by the Act and to reinstate the discharged employees with back pay, was properly sustained by the Circuit Court of Appeals, and its order is affirmed.

Affirmed.

Mr. Justice CARDOZO and Mr. Justice REED took no part in the consideration and decision of this case.

A true copy.

Test:

Clerk, Supreme Court, U. S.

SUPREME COURT OF THE UNITED STATES.

No. 536.—October Term, 1937.

Santa Cruz Fruit Packing Company, Petitioner, *vs.* National Labor Relations Board.	On Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit.

[March 28, 1938.]

Mr. Justice Butler, dissenting.

Carter v. *Carter Coal Co.*, 298 U. S. 238, decided that Congress lacks power to regulate terms and conditions of employment of those engaged in local production of commodities sold and about to be shipped in interstate commerce. The circuit court of appeals found two questions for solution. One was whether upon that point the *Carter* case, in 1936, has been overruled by our decision in 1937 in *Labor Board* v. *Jones & Laughlin*, 301 U. S. 1. The second was whether the power extends to cases where only 39% of goods locally produced are shipped in interstate commerce. The court, one judge dissenting, upheld the order. Each of the judges wrote an opinion; two held this Court has overruled the *Carter* case.

If the decision of the *Carter* case upon the point stated stands, the Board's order cannot be upheld. The lower court made its decision depend upon that question. Save authoritatively to decide it here, there was no reason for granting the writ. But the opinion just announced does not refer to the question.

In the *Jones and Laughlin* and companion cases, four dissenting Justices thought the Court then departed from well-established principles followed in the *Carter* case and quoted (p. 96) a passage from it expounding what it meant by "direct" effect on interstate commerce as distinguished from what is "indirect". And the dissenting opinion insisted (p. 97) that, under the *Carter* decision, the facts in those cases did not disclose any direct effect upon interstate commerce, and said: "A more remote and indirect interference with interstate commerce or a more definite invasion of

the powers reserved to the states is difficult, if not impossible, to imagine."

But the dissent failed to elicit from the Court any statement as to whether it meant to overrule the *Carter* case. The opinion does not discuss that case. It does, however, contain the following (p. 41): "In the *Carter* case . . . the Court was of the opinion that the provisions of the statute relating to production were invalid upon several grounds,—that there was improper delegation of legislative power, and that the requirements not only went beyond any sustainable measure of protection of interstate commerce but were also inconsistent with due process. These [meaning the *Schechter* and *Carter*] cases are not controlling here." The later decisions of this Court involving the power of Congress to deal with labor relations in local production do not refer to the *Carter* case. At least until this Court definitely overrules that decision, it should be followed.

Upon the authority of that case, I would reverse the order of the circuit court of appeals on the ground that, as applied here, the Act is unconstitutional.

Mr. Justice McReynolds concurs in this opinion.